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No. 35, Original.

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Exception of the Commonwealth of Massachusetts and Supporting Brief.

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ON REPORT OF THE SPECIAL MASTER.

Exception of the Commonwealth of Massachusetts.

Applying a standard of proof used in international boundary disputes, the Special Master found that Massachusetts had proven its claim of ancient title to the waters and seabed of Nantucket Sound. Report at 51, 58. However, the Special Master felt constrained to rule that Massachusetts must prove its title by evidence which is "clear beyond doubt." Report at 24, 51. Massachusetts takes exception to that ruling and its consequence, that Massachusetts is divested of its title to Nantucket Sound.

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ON REPORT OF THE SPECIAL MASTER.

Brief for the Commonwealth of Massachusetts in Support of its Exception.

Statement of the Case.

A. *Nature of the Present Proceedings.*

The exception which Massachusetts takes to the Special Master's Report is not of the usual kind generated by reports in marine boundary litigation in this Court. Indeed, it is termed an "exception" more in the formal than in the true sense, since no other procedural device obtains in this context. The present situation is unique, as it focuses solely on the applicable standard of proof.

The Special Master indicated that, were this a case of first impression, he would apply a standard of evidence less rigorous

than "clear beyond doubt." Report at 24. He felt, however, that the Court had previously, *by implication*, favored a "clear beyond doubt" standard. *Id*. Nevertheless, the Special Master also adumbrated the view that this might be a proper issue for review and clarification by the Court, and, accordingly, had the foresight to make alternate findings of fact as to the one remaining issue determinative of Massachusetts' claim.[1]

Based upon the age-old application of the eyesight test for demarcation, the Special Master found in the alternative, that Massachusetts did not prevail if held to the "clear beyond doubt" standard, but, on the other hand, that "Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate for this proceeding." Report at 51.

We, therefore, do not take exception in the customary sense to the Special Master's findings; rather, we pray that the Court adopt the Special Master's alternate finding after a review of the evidentiary principles involved, which would lead to a decree in Massachusetts' favor.

B. *The Prior Proceedings*.

This is the second phase of an action to quiet title commenced by the United States in 1968 against all the Atlantic coastal States except Connecticut. In its Decree of October 6, 1975, the Court affirmed the title of the United States to the continental seabed seaward of a line three geographic miles from the coastline of the United States, and affirmed the title of the defendant States to the seabed landward of the three-mile line. *United States* v. *Maine, et al*., 423 U.S. 1 (1975).

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[1] The Special Master stated that:

> Nevertheless, to prevent needless relitigation should the Supreme Court decide that Massachusetts is correct on the burden of proof issue, this report shall indicate its conclusions as to the validity of the Massachusetts claim under either standard.

Report at 24.

In January, 1977, the United States and Massachusetts filed a Joint Motion for Supplemental Proceedings to quiet title by determining the location of the Commonwealth's coastline, and the Court referred the matter to the Special Master. 433 U.S. 917 (1977).

Initially, the areas actually in dispute were the bodies of water known as Massachusetts Bay, Buzzards Bay, Vineyard Sound, and Nantucket Sound. Through negotiation, however, the parties substantially reduced the areas in dispute. First, Massachusetts accepted the closing lines proposed by the United States for Massachusetts Bay, and the United States accepted the closing line claimed by Massachusetts for Buzzards Bay. This settlement was approved by the Special Master and the Court. *United States* v. *Maine (Massachusetts Boundary Case)*, 452 U.S. 429 (1981). Second, in a Stipulation in Lieu of Amended Pleadings, filed April 30, 1982, the United States reduced the area claimed by it in Nantucket Sound. *See* Report of the Special Master, Appendix B. There remained for adjudication before the Special Master, then, only the status of the central portion of Nantucket Sound and the status of all of Vineyard Sound.[2]

Following extensive evidentiary submissions, testimony, briefs, and argument by the parties, the Special Master filed a very careful and particular report of his findings and recommendations. In brief, the Special Master found that Vineyard Sound is an historic bay, with appropriate closing lines, under Article 7(6) of the Convention on the Territorial Sea and Contiguous Zone, April 29, 1958 (hereafter the Convention), 15 U.S.T. 1607, T.I.A.S. 5639,[3] that Nantucket Sound is not, and

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[2] The claims of the parties are illustrated on the charts appended to the Report as Appendix C (United States' position, Nantucket Sound only) and Appendix D (Massachusetts' position). As an aid to the Court, we have reproduced a portion of Appendix D (itself a reproduction in part of Massachusetts Exhibit 1) at the end of this Brief.

[3] Article 7(6) of the Convention provides that

> The foregoing provisions [for the delimitation of bays] shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

that the baseline or coastline in the area of Nantucket Sound is generally in accord with the Stipulation in Lieu of Amended Pleadings (Appendix B to the Report).

Massachusetts takes no exception to the Report as it pertains to Vineyard Sound and we have been informed that the United States intends to take no exception with respect thereto. With respect to Nantucket Sound, Massachusetts no longer claims historic title, but still asserts that the Sound is inland waters under the doctrine of ancient title, *i.e.*, that the Sound is the Commonwealth's by right of the British Crown's discovery and occupation.

The Special Master ruled that the doctrine of ancient title "is generally accepted under international law," and is an available basis for an historic waters claim in this proceeding by virtue of this Court's determination that principles of international law are to be followed in fixing the coastline of the United States. *See* Report of the Special Master at 26-27, *citing* *United States* v. *Louisiana* (*Louisiana Boundary Case*), 394 U.S. 11, 17-35 (1969); *United States* v. *California*, 381 U.S. 139, 161-167 (1965). As explained by the Special Master, the doctrine differs from the doctrine of historic title in that ancient title is not prescriptive in nature. Ancient title is established by "effective occupation, from a time prior to the victory of the doctrine of freedom of the seas"; it is not necessary to show that the claiming state acquired prescriptive rights in the area as against the community of nations. Report at 25-26.

Massachusetts asserts ancient title to Nantucket Sound as the successor of the British Crown. To establish this proposition, Massachusetts undertook to show (a) that by virtue of discovery and occupation in the colonial period, the Crown acquired title to the Sound and (b) that Massachusetts acquired its title from the Crown by virtue of its colonial charters (or, at the latest, by virtue of the Treaty of Paris in 1783). As for the latter point, the Special Master found that whatever title the Crown acquired by discovery and occupation indeed passed to Massachusetts through the colonial charters. Report at 43.

To establish the former point, *i.e.*, that the Crown acquired title to the Sound, Massachusetts adduced evidence to show (a) that the Sound was inland waters under the doctrine of county waters, which was the municipal law of Britain from at least as early as the Fourteenth Century through at least the end of the Nineteenth Century; and (b) that in the colonial period, British colonists in fact occupied the Sound. The Special Master found that Massachusetts had adduced "sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them." Report at 58. Thus, to establish the Commonwealth's ancient title to Nantucket Sound, it remained only to establish that the Sound qualified in the colonial period as inland waters under the county waters doctrine.

After a thorough review of the English caselaw and treatises, the Special Master concluded that under the English common law both during the colonial period and afterward, an arm of the sea which is *inter fauces terrae* is "within the body" of the adjacent county, and therefore inland waters, if a person standing on one shore can discern the opposite shore. Report at 31-38, 43-47. This rule was applicable to sounds as well as to other arms of the sea. Report at 37-38.

The widest opening into the Sound is between Monomoy (sometimes called Cape Malabar) on Cape Cod and Nantucket Island, a distance at present of about 9.2 nautical miles. Report at 49. By ancient charts and other means, Massachusetts was able to show that Monomoy (or Malabar) existed in colonial times in its present location. The United States, on cross-examination of Massachusetts' expert, adduced testimony that Monomoy has varied in length during recorded history, but probably by no more than two miles, shorter or longer. Report at 50 and n.32. In addition, the Special Master found that people were able to see across the Sound at points wider apart

than the entrance between Monomoy and Nantucket. Report at 50-51. On this evidence, the Special Master concluded that Nantucket Sound "would have been considered waters *inter fauces terrae* before the Revolution." However, the Special Master ruled that this last proposition was not established by evidence which was "clear beyond doubt," due to the lack of evidence as to the exact width of the mouth of the Sound in the colonial period. Consequently, he ruled that "Massachusetts can therefore establish an ancient title to Nantucket Sound only if the Supreme Court holds that the 'clear beyond doubt' standard is inappropriate for this proceeding." Report at 51.

The Special Master stated that "[w]ere this a case of first impression, the Special Master would be inclined to agree with Massachusetts that the 'clear beyond doubt' standard is an impossibly high burden to impose on a state putting forth a historic claim." Report at 24. He noted, however, that the special masters in three earlier coastal boundary cases had construed this Court's opinions to impose just that burden. Report at 22-23, *citing* Report of the Special Master, *United States* v. *Maine, et al. (Rhode Island, New York)*, No. 35 Original, at 11 (1984); Report of the Special Master, *United States* v. *Florida*, No. 52 Original, at 42 (January 18, 1974); Report of the Special Master, *United States* v. *Louisiana*, No. 9 Original, at 18-19 (July 31, 1974). Although none of these rulings as to the standard or quantum of proof was explicitly approved by this Court, the Special Master deemed himself to be bound, reasoning that, in approving the reports, this Court had implicitly affirmed the special masters' rulings that the states must establish their claims by evidence that is "clear beyond doubt." Report at 24.

In sum, Massachusetts has established that Nantucket Sound is historic inland waters under the doctrine of ancient title, but has not done so by evidence which is clear beyond doubt. Massachusetts takes exception only to the ruling that the "clear beyond doubt" standard is applicable in this case.

Summary of the Argument.

I. This Court has determined that coastal boundary litigation is to be governed by the principles of international law, as if the claimant state were an independent sovereign, and the United States were a contending foreign nation. In such disputes, principles of international law require the claiming state to prove its claim, but impose no heightened burden. Rather, if the claiming state persuades the finder of its claim, as Massachusetts did here, then it is entitled to prevail.

There is no reason in policy or law to impose a more onerous burden on a State, even where the United States purports to have disclaimed an historic waters claim. The factual significance of a disclaimer will of course vary from case to case, and so should be left to the tribunal in each case to determine. Nor is a disclaimer of historic inland waters entitled to weight beyond its evidential significance in a particular case on the ground that it represents an exercise of the foreign affairs power. First, to hold otherwise would be to sanction an impermissible contraction of the State's territory. Second, to give any weight to a disclaimer beyond its evidential value in the circumstances of a particular case would be inconsistent with the Submerged Lands Act. In this domestic context, Congress's grant to the States of seabed ownership beyond the baseline does not trench on the Executive's authority over foreign affairs. As construed by this Court, the Act makes part of the baseline for the grant congruent with the line enclosing inland waters, and leaves to the Court, not the State Department, the task of determining the coast line, with the understanding that

the States' historic inland waters will not be contracted by the Act. Since the United States' argument would make the Act an instrument for the severe contraction of State inland waters, it must be rejected. This Court's opinions neither hold nor imply that in the face of a disclaimer the States must prove their historic inland waters claims by evidence which is clear beyond doubt.

II. If this Court's prior opinions impose an especially rigorous standard of proof on States asserting an historic waters claim, that standard only applies when the United States unequivocally and for reasons independent of the litigation has taken a contrary position in its international relations. But the Special Master found that the United States' alleged disclaimer of the inland waters status of Nantucket Sound was ineffective because (a) it was not unequivocal, (b) its genuineness was suspect, and (c) like the alleged disclaimer of the inland waters status of Mississippi Sound, it was adopted during the pendency of litigation with Massachusetts. Report at 19-20, 69.3-69.4. Consequently, Massachusetts was not required to prove its case by evidence which is clear beyond doubt.

Since the Special Master was persuaded, albeit not by the standard of "clear beyond doubt," of Massachusetts' ancient title to Nantucket Sound, the Court should decree that Nantucket Sound is historic inland waters, based upon ancient title, and within the boundaries of Massachusetts.

Argument.

I. Whether or Not There Is an Effective Disclaimer, Massachusetts Need Not Establish Its Claim By Evidence Which Is "Clear Beyond Doubt."

A. *The Imposition of Such an Extreme Standard is Not Supported by the Decisions of International Tribunals or the Common Law Governing Actions to Quiet Title.*

This Court has repeatedly said that a State's historic waters claim is to be judged according to principles of international law. *See, e.g., United States* v. *Louisiana* (*Mississippi Sound Case*), 105 S.Ct. 1074, 1078-1080 (1985); *United States* v. *Alaska*, 422 U.S. 184, 188-189 (1975). Unless some policy unique to domestic coastal boundary litigation requires otherwise, the Court's reference to international rules and principles presumably includes such issues as the burden and standard of proof,[4] for those issues are as determinative of the outcome of a dispute as are the substantive elements of the claim. *Cf. Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 212 (1939) (burden of proof is "part of the very substance" of a claim).

In order to determine the standard of proof applicable to historic waters claims, we turn first to the "Juridical Regime of Historic Waters, Including Historic Bays," [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/143 (1962) (hereafter the *Juridical Regime*), which this Court has relied upon as "authoritative." *Mississippi Sound Case*, 105 S.Ct. at 1080. *See also United States* v. *Alaska*, 422 U.S. at 200; *Louisiana*

[4] The Court recently demonstrated very clearly the connection between substantive policy and the standard of proof in *Santosky* v. *Kramer*, 455 U.S. 745 (1982), holding that states may not terminate parental rights in an adoption proceeding without proving parental unfitness by clear and convincing evidence.

Boundary Case, 394 U.S. at 23-26 nn.27-30, 76 n.103. With regard to the *burden* of proof (as distinguished from the quantum or standard of proof), the *Juridical Regime* holds that

> The general statement that the burden of proof is on the State claiming historic title to a maritime area is not of much value. . . . The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. . . . In a dispute, each party has to prove the facts on which he relies, otherwise the arbitrator will not take these alleged facts into account. Furthermore, as regards the interpretation of the law and the evaluation of the facts in light of this interpretation, each party will naturally try to persuade the arbitrator to adopt the party's views in this respect; to the extent that the party does not succeed in this, it will obviously have to bear the burden of his failure.

Juridical Regime ¶ 158; *see id.* ¶ 188.

With regard to the quantum or standard of proof which will be sufficient to establish an historic waters claim, the *Juridical Regime* rejects the view of some writers that an historic waters title is "exceptional," and therefore that the standard of proof must be rigorous. *Id.* ¶¶ 40, 54-59, 78. Instead, the author concludes that

> the widely held opinion that the regime of "historic waters" constitutes an exception to the general rules of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate "historic waters" to such rules as an exception or not an exception, but to consider the title to "historic waters" independently, on its own merits.

Id. ¶ 184. And, in assessing an historic waters claim, the *Juridical Regime* advises that "the existence of such a title is to a large extent a matter of judgement [*sic*]" and that "[a] large element of appreciation seems unavoidable in this matter. . . ." *Id.* at 187. *See also Mississippi Sound Case*, 105 S.Ct. at 1085 (endorsing a "flexible," and "relaxed" approach to the evidence).

Thus, there is nothing in the *Juridical Regime* that even implies that a claimant state has to meet this exceptional "clear beyond doubt" standard of proof, and every indication therein is to the contrary. Moreover, the decisions of international tribunals do not require of the claimant to historic waters proof meeting this draconian standard. Indeed, again, every indication is to the contrary. Illustrative is the treatment given historical evidence by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* [1951] I. C.J. Reports 116, 142, a case which the Special Master discussed at length in his Report at 26, 56-57. That case involved the permissibility of a *method* of straight baseline delimitation[5] (which Massachusetts does not seek to apply in the present case).

A crucial element of Norway's claim was that the areas selected to be enclosed had been, in fact, the subject of ancient and peaceful exclusive use by the inhabitants of the adjacent land. In its concluding discussion, the majority opinion evaluated the evidence adduced in this regard by Norway:

> These ancient concessions tend to confirm the Norwegian Government's contention that the fishery

[5] The case was, of course, decided prior to the provision for this method as an optional alternate in the Convention, Article 4.

zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they applied, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.

Anglo-Norwegian Fisheries Case, [1951] I. C.J. Reports at 142. In upholding Norway's contention, the characterizations which the Court applied to Norway's evidence ("tend to confirm," "it is suggested," "although it is not always clear", and "lend some weight to") demonstrate that the Court did not have in mind an "exceptional" standard of proof (such as "clear beyond doubt").[6]

[6] An interesting parallel between the *Fisheries Case* and the case at bar is worth noting. The International Court of Justice was imposing a non-rigorous evidentiary burden as to the applicability of a generally accepted eyesight test to a specific coastal area; that is the very issue as to which the Special Master made his alternate finding which is determinative here.

In this case, assessing Massachusetts' claim on its own merits, the Special Master was persuaded that Massachusetts has an ancient title to Nantucket Sound, *i.e.*, a title based upon discovery and occupation as an original mode of acquisition. Report at 51, 58. *See Juridical Regime* ¶ 71. He was unpersuaded that the United States had effectively disclaimed this title. Report at 19-20. *See Mississippi Sound Case*, 105 S.Ct. at 1086. "On its own merits," therefore, under principles of international law, Massachusetts' claim to Nantucket Sound should prevail.

It is perhaps useful to note that if the Court were to look to the domestic common law rather than to international law for the applicable standard of proof, the result would be the same. In proceedings to quiet title (which this case is) or to remove clouds therefrom, the claimant need only prove his case by a preponderance of the evidence. *See* 74 C.J.S., Quieting Title § 80. Where the claim is based upon adverse possession, a somewhat stricter standard has been imposed in some cases, 2A C.J.S., Adverse Possession § 293, but it bears noting once again, as the Special Master determined, Report at 25, that Massachusetts' ancient title claim is not prescriptive in nature.[7]

[7] Massachusetts' claim is not one of adverse possession. Historic inland waters claims in general are not accurately analogized to adverse possession. *See Juridical Regime* ¶¶ 65-68. This is true *a fortiori* of an historic waters claim based on ancient title, since in such a case the territory discovered and occupied by the claimant is *terra nullius*, *i.e.*, territory in which no other nation, nor even the community of nations, had a claim or interest. *Id.* ¶¶ 69-71. *See* Report at 25-26. Under the ancient title doctrine, the claimant's original title is clear, not adverse, and is fortified by usage. *Juridical Regime* ¶ 71. To put the matter differently, an historic title claim may be prescriptive, in the sense that it seeks to "divest" the community of nations of its interest in an area; but in this case, where the Special Master has found a non-prescriptive ancient title, the imposition of the evidentiary burden urged by the United States would have the effect of divesting Massachusetts of its title.

B. *In the Context of State-Federal Marine Boundary Disputes, Even where there Is a Disclaimer, the Imposition of the Extreme Evidentiary Standard Finds No Support in Policy or in the Decisions of this Court.*

The United States has repeatedly argued that a special rule should exist in cases in which it disclaims historic waters title. Here, a distinction must be drawn between the argument that a disclaimer should be given conclusive or extraordinary weight for reasons of policy, and the argument that it should be given such weight because of its evidentiary significance to the issues at hand. The Commonwealth does not question the proposition that a disclaimer by the United States may sometimes, as a matter of fact, count heavily against a State's historic waters claim; but the factual significance of a disclaimer obviously depends on the circumstances. A disclaimer broadcast to the world may have little or no significance because of its recency or inconsistency with prior conduct or the weight of the evidence. *See Mississippi Sound Case*, 105 S.Ct. at 1086. Since the significance of a disclaimer in this sense is circumstantial, it would be nonsensical to assign any particular weight to disclaimers in general on an *a priori* basis.

The United States, however, appears to argue that special burdens should be imposed upon the States, in cases where it has disclaimed historic title, for reasons of policy, because it makes such disclaimers in the exercise of its foreign affairs power. *See, e.g., Louisiana Boundary Case*, 394 U.S. at 75-76. This is only an argument of opportunity, however, since it is clear that there is no inherent connection between domestic boundary litigation and international affairs. *See, e.g., United States* v. *Louisiana*, 363 U.S. 1, 30-36, 51 (1960) (executive prerogatives are not implicated in the granting of seabed rights to the States). The opportunity to make the argument derives from the Court's decision in *United States* v. *California*, 381

U.S. 139, 161-167 (1965), to apply the provisions of the Convention in litigation over coastal boundaries.[8]

The argument that the United States' position is conclusive has been accepted with respect to claims based on a system of straight baselines, and claims based on the concept of fictitious bays. *Id.* at 167-168, 172. It has been rejected however with respect to historic waters claims. *Mississippi Sound Case*, 105 S.Ct. at 1086 (disclaimer was insufficient to defeat previously ripened historic waters title); *Louisiana Boundary Case*, 394 U.S. at 77. As the Court has stated, to decline to give effect to an otherwise valid historic waters claim, on the basis of Executive action after the claim is perfected, would be to sanction "an impermissible contraction of territory" by the Executive. *See Louisiana Boundary Case*, 394 U.S. at 77 n.104.

Furthermore, not only would such a result be questionable under the Constitution, but it would also contravene the terms and policy of the Submerged Lands Act. While Massachusetts' title to the seabed of its inland waters rests upon Constitutional grounds, *see Pollard* v. *Hagan*, 44 U.S. 212, 230 (1845), and is not dependent upon legislation, the Submerged Lands Act is nevertheless highly relevant to this discussion, since in fact the congressionally chosen baseline for the grant under that Act is congruent with the seaward limit of inland waters. Under

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[8] The argument is opportunistic in another sense. In this case, the United States has said that it regards coastal boundary determinations to be binding in its international dealings only in the usual case and for the time being. Brief for the United States before the Special Master at 8 and n. The State Department expert testified before the Special Master that the Coastline Committee does not deem itself bound by decrees in domestic coastal boundary litigation. Transcript at 93. For example, long after the United States had stipulated to the Buzzards Bay closing line, *see* 452 U.S. 429 (1981), the Coastline Committee continued to debate whether its charts should be redrawn to reflect that line. See Massachusetts Exhibit 30, Coastline Committee minutes of December 19, 1981, at 2.

that Act, as the Court has said, Congress left the task of delimiting inland waters, for the purposes of the Act, to the Court, not the State Department. *United States* v. *California*, 381 U.S. at 164-165. Moreover, if Congress left the Court free to accept or reject particular geographic methods for delimiting inland waters under the Act, it is nevertheless clear that it intended to leave historic inland waters (however defined by the Court) undisturbed. *Id.* at 150-160. Since in enacting the Submerged Lands Act Congress was not constrained in its choice of baselines by the United States' position in international affairs, *United States* v. *Louisiana*, 363 U.S. at 30-36, it would appear inconsistent with the Act to give any weight to a disclaimer beyond its inherent evidential significance on the ground that it is an exercise of the foreign affairs power. Consistent with this view is the Court's ruling in the *Louisiana Boundary Case* that a State's claim of historic waters is to be treated "as if it were being asserted by the national sovereign and opposed by another nation." 394 U.S. at 77. In that framework, the disclaimer in this case has the same significance as a protest by a foreign nation, and no more.[9]

Although foreign policy considerations do not require that the States carry an extraordinary burden of proof, the Special Master nevertheless considered this Court's previous decisions to implicitly approve the imposition of a "clear beyond doubt" burden on the States. Report at 24, *quoting United States* v. *California*, 381 U.S. at 175, and *Louisiana Boundary Case*, 394 U.S. at 77. However, the immediate question in each case was whether disclaimers are to be treated as conclusive. In *California*, the question did not need to be reached because the State's case was "questionable" — so much so that, without imposing any special burden on it, the Special Master still found that the State had not made its case. 381 U.S. at 174.

[9] In some cases, a disclaimer might also count as evidence against a claim, if for instance it was made while the claim was still ripening. This is not such a case. *See Mississippi Sound Case*, 105 S.Ct. at 1056.

In passing, the Court expressed its reluctance to hold a disclaimer conclusive in all circumstances, including the extreme case, in which the evidence was "clear beyond doubt." But this was not to suggest that a disclaimer would be conclusive *except* in the extreme case. In the *Louisiana Boundary Case*, the Court refused to give a disclaimer conclusive effect even though the evidence of the historic waters claim was not "clear beyond doubt," because to do so would be "to permit the National Government to distort [international law] principles." 394 U.S. at 77.

It may be that the masters in two previous cases have construed this Court's opinions to require the States to prove their historic waters claims by evidence which is clear beyond doubt. *See* Report at 23-24. However, those specific rulings have not been confirmed by this Court. In *United States* v. *Maine (Rhode Island and New York)*, No. 35, Original (1984), the States appear not to have focused on the burden of proof before the Special Master, and they abandoned their historic waters claim after the report was filed. Similarly, Florida apparently did not contest the Special Master's adoption of the "clear beyond doubt" standard in its case. *See* Report of the Special Master at 42, *United States* v. *Florida*, No. 52, Original (January 18, 1974).

The Special Master also referred to a Report in *United States* v. *Louisiana*. *See* Report at 23-24, *citing* Report of the Special Master at 18-19, 21-22, *United States* v. *Louisiana*, No. 9, Original (July 31, 1974). There, however, the Special Master ruled that the State's evidence, like that in *United States* v. *California*, was so questionable that the disclaimer was decisive. The master thus avoided the necessity of determining the precise standard of proof; and the same master in his report in the *Mississippi Sound Case* again avoided that determination, while indicating his doubt that the proper standard is "clear beyond doubt." Report of the Special Master at 44,

United States v. *Louisiana (Alabama and Mississippi)*, No. 9, Original (April 9, 1984). *Accord, United States* v. *Alaska*, 352 F.Supp. 815, 819 (D. Alaska 1972), *aff'd*, 497 F.2d 1155 (9th Cir. 1974), *rev'd on other grounds*, 422 U.S. 184 (1975).

Furthermore, in *Alaska*, the United States pressed strongly the argument that a disclaimer in whatever form, whenever made, is conclusive, except possibly where the evidence is clear beyond doubt that an historic title had ripened prior to the disclaimer. *See* Petition for a Writ of Certiorari at 18-20, *and* Brief for the United States at 53-60, *United States* v. *Alaska*, 422 U.S. 184 (1975). Without discussing the standard of proof issue, this Court reversed the lower court decision because the evidence simply did not show an unequivocal assertion of dominion over the disputed waters, or foreign acquiescence therein. 422 U.S. at 190, 196-197, 199-200, 202-203. If anything, the Court's discussion of the evidence suggests that no exceptional standard was being applied. Of great significance, however, is the Court's response to the United States' argument concerning its alleged disclaimers:

> The United States has argued that historic title to Cook Inlet is defeated by several United States disclaimers of sovereignty over the waters of lower Cook Inlet. The Court previously has discussed the importance of governmental disclaimers in weighing claims to historic title in actions of this kind. . . . The District Court rejected the disclaimers on the grounds that they were ill-advised and, perhaps, self-serving. . . . Inasmuch as we have concluded that none of the facts relied upon by the District Court suffice to establish historic title, we have no occasion to consider whether the disclaimers of the United States could have defeated otherwise sufficient facts.

Id. at 203-204 n.17. If this footnote does not actually reject the "clear beyond doubt" standard, it at least suggests that the question whether a State must meet that standard is yet to be decided. *See also Mississippi Sound Case*, 105 S.Ct. at 1086.

In sum, no reason in policy or law supports the United States' argument that its disclaimer should be given weight beyond its evidential value or that Massachusetts should carry a heavier burden because, some three centuries after the events on which the title is based, the United States purports to have disclaimed historic waters status of the Sound. *See id.*

II. Even if the Extraordinary Standard Applies When there is an Effective Disclaimer, It Does Not Apply Here Because the United States has Never Effectively Disclaimed the Inland Water Status of Nantucket Sound.

Whenever this Court has used the phrase "clear beyond doubt," it has used it in connection with the question of the effectiveness of a disclaimer. *See Mississippi Sound Case*, 105 S.Ct. at 1085; *Louisiana Boundary Case*, 394 U.S. at 77; *United States* v. *California*, 381 U.S. at 175. *See also United States* v. *Alaska*, 422 U.S. at 203-204 n.17 (declining to decide whether a disclaimer "could have defeated otherwise sufficient facts"). Thus, if imposition of an extraordinary burden on a claimant State is ever required by this Court's decisions, such is not the case where there has not been an effective disclaimer.

In the case of Nantucket Sound, the Special Master dealt with the alleged disclaimer of the inland waters status of Nantucket Sound by discussing the evidence pertaining to the same 1971 series of Coastline Committee charts that were relied on in the *Mississippi Sound Case*, 105 S.Ct. at 1085. The Special Master found that those charts were ineffective to disclaim the inland waters status of Nantucket Sound.

In the first place, the Special Master found that the effectiveness of the Coastline Committee charts was vitiated, as to Nantucket Sound, by the Coast Guard's own independent determination under its statutory authority that inland navigational rules applied in Nantucket Sound. Report at 19. Pursuant to the International Regulations for Preventing Collisions at Sea, 1972 (1972 COLREGS), 28 U.S.T. 3459, T.I.A.S. 8587, inland rules may not be applied to any area of the high seas, or indeed (as the Coast Guard construed the COLREGS) to territorial waters "outside of rivers, harbors, and inland waterways." Massachusetts Exhibit 19; 42 Fed. Reg. 35782, 35783, 35793 (July 11, 1977). In determining to apply the inland rules in Nantucket Sound, the Coast Guard therefore determined that the Sound is inland waters. For this reason, the Special Master determined that the lines drawn by the Coast Guard under the COLREGS were of a different nature, and had a different significance, than the Coast Guard lines previously considered by this Court. Report at 17-18, *discussing Louisiana Boundary Case*, 394 U.S. at 17-21. Moreover the regulations were necessarily disseminated widely in the international community, and encountered no foreign protest. Report at 16-20.[10]

[10] The Special Master found in part that

> The Coast Guard was aware of this requirement [that inland rules could only apply to internal waters] and drew the lines in accord with its best independent interpretation of international law. . . .
>
> [A]ll seagoing countries engaged in commerce with the United States knew or should have known of the 1972 COLREGS lines. . . . Therefore, the failure of any government to remonstrate over the drawing of these lines indicates that other countries accepted the validity of designating the sounds as internal waters of the United States.

Report at 20.

In sum, the only alleged disclaimer by the United States, the Coastline Committee charts, was flatly controverted by the United States itself in its international dealings.

The Special Master also considered the Coastline Committee charts to be ineffective as a disclaimer because the conduct of the United States in this litigation cast doubt on the genuineness of its purported disclaimer.[11] Report at 20. Although the Special Master emphasized the United States' reversal of its position regarding Buzzards Bay (which it also purportedly disclaimed), the record is replete with evidence supporting the suspicion. For instance, Massachusetts demonstrated that the Coastline Committee did not consider itself authorized to determine whether a particular body of water was historic inland waters. Report at 14.[12] Thus, whether or not the charts might

[11] Plainly, if extraordinary weight is to be given to a disclaimer, for the reason that it is an exercise of the foreign affairs power, no such weight should be given to a disclaimer which is not genuinely an expression of that power.

[12] On the face of the 1971 charts, the Committee affixed the caution that

> The lines drawn on this document delimit provisionally the territorial sea, contiguous zone, and certain internal waters of the United States. They have been prepared by an interdepartmental committee and represent its interpretation of relevant legal principles as applied to the geographical information shown in a Coast and Geodetic Survey nautical chart which has been used as a base. These lines are subject to revision whenever it is required by amplification or correction of the information shown on the chart or by reinterpretation of the legal principles involved. . . .

United States Exhibits 18a, 18b. In view of this caution, Massachusetts argued and still maintains, that the Coastline Committee charts could not be reasonably understood as a disclaimer of the historic inland waters status of any body of water not shown to be enclosed on the charts. Presumably, foreign nations would have been so advised had they made inquiry as to the meaning of the caution. Indeed, the record includes letters transmitting the charts to foreign governments and calling particular attention to the caution. United States Exhibits 15-18. The Committee itself considered that the caution would adequately "limit the extent to which these documents [*i.e.*, the charts] can properly be relied on." United States Exhibit 14.

nevertheless operate as a disclaimer of such waters, they do so by accident rather than design. Consequently, no special burden should be imposed on Massachusetts on the theory that the charts represent an exercise of the foreign affairs power.

The United States' conduct with respect to the 1977 Coast Guard lines is also revealing in this regard. That the Coast Guard treated the Sound as inland waters for purposes of the COLREGS came to the attention of the Justice Department during discovery in this case. After a series of Coastline Committee meetings, the Coast Guard was persuaded to confess error on the record and to redraw its lines to conform them to the United States' litigation posture. Report at 17. As the Special Master obliquely suggested, Report at 17, 18 and n.6a, where the only recent governmental statement not driven by coastal boundary litigation favors the State's position, and where the Justice Department is shown to have brought its influence to bear "to bring [the Coast Guard's safety regulations] into accord with the litigation posture of the United States," Report at 17, 18, the United States may fairly be said to have distorted principles of international law, in the name of external affairs, to gain domestic advantage. *See Louisiana Boundary Case,* 394 U.S. at 77.

Finally, the Special Master also concluded that the Coastline Committee charts did not constitute an effective disclaimer because they were published while the Court was considering the first phase of this case. Report at 69.3-69.4. In this respect, the Special Master followed the opinion of this Court in the *Mississippi Sound Case,* 105 S.Ct. at 1085-1086. Although the status of Nantucket Sound was not specifically before the Court when the charts were published, neither was the status of the Mississippi Sound then in active litigation.[13] Moreover,

[13] Supplemental proceedings to determine the status of Mississippi Sound were commenced in February and March, 1980. *See* 445 U.S. 923 (1980) (as to Alabama); 444 U.S. 1064 (1980) (as to Mississippi).

the evidence in this case positively demonstrates that the United States already considered Massachusetts' coastline to be in litigation in 1970, for it advised the Commonwealth by a letter in May of 1970 that "all contacts with the Federal Government relating to our litigation with your State over the location of the coastline should be made through the Department of Justice." United States Exhibit 34.

In sum, because the United States' first and only purported disclaimer, in 1971, of the inland waters status of Nantucket Sound was contradicted by its international position as articulated by the Coast Guard, because it is not a genuine exercise of the foreign affairs power, and because it was announced during the pendency of this litigation and is now advanced to prevent recognition of a claim which ripened (as the Special Master found) long ago, that disclaimer is ineffective. Accordingly, because there was no effective disclaimer, Massachusetts is not required to demonstrate its historic waters claim by evidence which is "clear beyond doubt," even if such a standard is found to apply in disclaimer cases.

Conclusion.

This, then, is the point that has been reached: the establishment of Massachusetts' ancient title hinges upon the choice of the required quantum of proof. What the United States seeks to require of Massachusetts is that it prove, by an evidentiary standard sufficiently rigorous to convict a person of a criminal offense, that one could see across the entrance to Nantucket Sound several centuries ago as readily as one can today. This, it should be noted, in the face of evidence acceptable to the Special Master that one indeed could have done so, and, moreover, in the total absence of any evidence (as opposed to

speculation) by the United States indicating that one could not see across that entrance. Accordingly, for the reasons stated, we respectfully pray that the Court adopt and confirm the alternate finding of the Special Master that entitles Massachusetts to a decree in its favor.

Respectfully submitted,

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Addendum.

Excerpt from Massachusetts Exhibit 1, showing the closing lines claimed by Massachusetts in the area of Nantucket Sound and Vineyard Sound, and the closing line claimed by Massachusetts and decreed by the Court in the area of Buzzards Bay.

OMEGA LINEAR INTERPOLATOR

CURRENT DIAGRAM

GEORGES BANK AND NANTUCKET SHOALS

Explanation

Hourly directions and velocities of tidal currents at thirteen stations are shown by arrows. The length of the arrow from the center of the circle represents the average velocity on a scale of one inch equals two knots. The figures at the arrow heads are the hours after the time of maximum flood at Pollock Rip Channel, the daily predicted times of which are given in the National Ocean Survey Atlantic Coast Current Tables. The velocities plotted should be increased by 20 per cent when the moon is full or new and decreased by 20 per cent when the moon is on first or third quarters. For effect of wind on tidal currents, see Current Tables, Atlantic Coast.

SCALE OF VELOCITIES

1 0 1 2 KNOTS

CAUTION

Temporary changes or defects in aids to navigation are not indicated on this chart. See Notice to Mariners.

Floating aids (other marks or when on-station) in this chart aids to navigation are subject to being replaced by other types or removed. For details see U.S. Coast Guard Light List.

CAPE COD BAY

CAPE COD

(chart 3246)

DUMP SITE

(see note S)

BUZZARDS BAY

(see chart 3237)

NANTUCKET SOUND

(see chart 3237)

(see chart 3218)

Great Round Shoal Channel

(see chart 3237)

Tuckernuck I

Muskeget I

Cape Poge

Chatham Roads

Pollock Rip Channel

Monomoy Point

Nauset Beach

Provincetown

Plymouth

Hyannis

Falmouth

Edgartown

Vineyard Haven

Nantucket

Woods End

Race Point

Highland

Chatham

Wellfleet

Orleans

Barnstable

Sandwich

Scituate

Duxbury

Marshfield

Gurnet Point

Manomet Point

Saquatucket Harbor

Cotuit

Osterville

Centerville

Hyannis Harbor

Hyannis Port

Barnstable Harbor

Sesuit Harbor

Wychmere Harbor

Pleasant Bay

Nauset Harbor

Nauset Inlet

Nauset Beach

Provincetown Harbor

Provincetown Channel

Wood End

Race Point

Highland

Chatham

Wellfleet

Orleans

Barnstable

Sandwich

Scituate

Duxbury

Marshfield

Gurnet Point

Manomet Point

Saquatucket Harbor

Cotuit

Osterville

Centerville

Hyannis Harbor

Hyannis Port

Barnstable Harbor

Sesuit Harbor

Wychmere Harbor

Pleasant Bay

Nauset Harbor

Nauset Inlet

Nauset Beach

Provincetown Harbor

Provincetown Channel

70°

69°

68°

42°

40°

30°

20°